responsibility under Section 706 to promote investment by the incumbent LECs (ILECs) in advanced communications capabilities. Instead, it acted in a way that patently discourages such investment. It did this by making the unbundling/TELRIC regulatory regime fully applicable to any advanced telecom facilities of the ILEC.

As stated, there is now no advanced telecommunications service (i.e, switched, broadband) available to residences. Consider the following two likely scenarios to meet this need. The cable television industry does have one-way broadband capacity, employing a coaxial cable drop to the home to deliver cable (video) services. Several large cable entities commendably have decided to use this base, to modernize their system (usually employing a technical approach called HFC, for hybrid-fiber-coaxial, with the latter being the coaxial drop into the home), to add the necessary switches and electronic equipment, and thus to provide switched broadband telecom services. For example, Continental Cablevision plans to enter the local telephone area, and indeed may be uniquely positioned to do so when its operations and facilities are taken over by US West, a Regional Bell Operating Company. Significantly, if the cable company proceeds in this fashion, its telecom operations would not come under any economic regulation, and specifically would not be subject to the unbundling/TELRIC regime.[11]

Now consider if the ILECs embark on the same course. They also have zero capability to deliver switched broadband to homes and indeed do not have the advantage of the coaxial drop. Most have decided upon the same HFC approach as cable.[12] But if the ILEC goes forward with

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matter raised in this brief -- the application of unbundling/TELRIC to intrastate advanced communications elements of ILECs.

[11] There would only be general interconnection and resale duties under Section 251(a),(b).

[12] The technology is so dynamic that it is not possible to forecast possible future changes such as a "wireless radio" drop into the home. Several ILECs propose to employ an integrated approach -- that is,

these plans for an advanced communications (switched broadband) network, it would come under the unbundling/TELRIC regulatory regime. This means that the advanced network, either in part (e.g., the broadband line into the home) or in whole (as a so-called "shadow network"), would be made available to all competitors on a TELRIC (forward-looking) basis. Further, the ILEC could not charge an interconnection price that would repay it for considerable R&D costs involved in the broadband undertaking.

We submit that the above analysis shows the obvious error of the Commission in treating future investment for advanced communications by the ILECs under the unbundling/TELRIC regime. The ILECs are rational economic entities. Why should they make the large, risky investment in switched broadband facilities if they must make the facilities available to competitors on the unbundled/ TELRIC basis? Why invest in HFC or wireless drops or whatever, if the investment, should it turn out to be inefficient or a failure, will be eliminated from prices charged to competitors for the advanced network? There would be little reason to make such investments, and every reason to invest in areas like cellular or personal communications services, long distance, cable, wireless cable, value added content, etc., services where the unbundling regime is inapplicable.

Even though the ILECs urged that the Commission would be discouraging future investment in light of the unbundling/TELRIC regime, the Commission never explains why it is proceeding in this fashion as to advanced communications. There is no explanation why US West, when it operates as Continental Cable in Atlanta or New England, can engage in advanced telecom

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part of the network would be used for cable television operations and another part is employed for telecom operations, including high-speed data for, say, telecommuters. Linda Moss, *Tele-TV lines up two for ad*

activities without any requirement of unbundling/TELRIC, but when it acts, also from a zero starting base as to residences, as an in-region ILEC delivering the same advanced telecom service, it does come under that regimen. It is arbitrary for the Act to be implemented in this fashion.[13]

The Commission raised the issue of the applicability of Section 706. See Part XIII, First Report. The Alliance urged that "Section 706 should under underlie all of the FCC's proceedings," including of this first and most important one. See par. 1267, First Report. The Commission, however, sloughed aside all consideration of Section 706 in this action, saying that it intends to address issues related to Section 706 in a separate proceeding. Par. 1268. But as we have shown, the application of unbundling/TELRIC may well have an adverse effect on future investment directed to advanced communications capabilities. The FCC under Section 706 was, therefore, bound to consider the matter in this proceeding and not put it off to some future time, as it did in the case of dealing with possible inhibiting effects on ILEC incentive to innovate as to AIN (advanced intelligent network databases -- see par. 489, First Report) or proprietary elements (par. 282). Whatever the merits in those instances, here the Commission was dealing with an express Congressional mandate -- accelerate the deployment of advanced communications by removing barriers to investment. Instead, it placed a substantial barrier to that very investment.

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*test, in* Multichannel News, July 17, 1995, at 89. The latter is obviously desirable in light of the 1996 Act's goal of making advanced communications available to all Americans.

[13] Video distribution is today by far the largest use of broadband facilities to the home. Significantly, when the ILEC as a cable or Open Video Service (OVS) operator and the cable television system both operate in an area, both are deregulated as to government regulation of the prices charged customers. See Sec. 301(b)(3)(D). Similarly, when both operate as advanced telecom providers, both should be treated equally, with no economic (price) regulation and no unbundling/TELRIC.

We urge, therefore, that the Commission was required to adopt a course in this proceeding that would encourage the deployment of advanced communications capabilities. It could, for example, have simply excluded such advanced elements, when built and implemented, from the unbundling/TELRIC regime, just as those of cable are excluded when it enters telecom activities.[14] It could follow the course advocated by Professor Alfred E. Kahn calling for the advanced communications networks, whether telecom or cable, to go forward on an unregulated basis, with the shareholder taking all the risks and getting all the benefits (and with ratepayers protected as to basic service in view of price caps).[15] There are other courses. The choice is one for the agency. What is not permissible under the Act is its present inaction.

The Commission may argue that it has no choice under the Act but that it must apply unbundling/TELRIC to all network elements -- existing or future, basic or advanced. But the Commission has already indicated that it has discretion to alter its regime in order to spur innovation. See supra, at 7. Surely it should do so here where it is under an express Congressional mandate. Stated differently, the requirements of Section 251 must be read in conjunction with those of Section 706.[16]

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[14] If some element of the integrated advanced communications network replaces an essential element or link of the present narrow band system, that element should intend to be made available to newcomers under the unbundled/TELRIC regime, but solely on a narrowband basis to residences. Significantly, the Commission has held that generally cable has no right to take any part of the large segment of an ILEC OVS operation that is to be available on a common carrier basis. See Second Report and Order, Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46, 11 (May 31, 1996) (Second Report and Order). Appeal pending, BellSouth Corp. v. FCC, C.A.D.C Similarly, there should no basis for cable to be able to take the elements of an ILEC advanced telecom operation (or all of them as a shadow network). All competitors, starting from the same zero base, should simply build their own networks.

[15] See Declaration of Alfred E. Kahn, dated July 19, 1996, in CC Docket No. 96-112, Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services.

[16] We believe that Section 706 is controlling. But no different result would result if the matter were considered under Section 401, allowing the Commission to forbear when the criteria set out in 401(a) are

## CONCLUSION

Accordingly, we urge that the Court should direct the Commission to take Section 706 into account in this proceeding. A remand is called for to protect the strong public interest mandate of that section.

Respectfully submitted,

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met. Section 401(c) states that the Commission may not forbear from applying the requirements of 251(c) or 271 until it determines that those requirements have been fully implemented. Clearly, the Act permits future forbearance when enforcement is unnecessary to insure just rates, protection of consumers, or consistency with the public interest (i.e., when some sector is in the effective competition zone). That is the case of ILEC advanced communications capabilities as to residences. The ILEC has no present monopoly and indeed starts behind cable. As to video distribution or high speed Internet connection, it will face competition from other transmissions modes like cable and again has no monopoly. When these considerations are combined with the express public interest benefits set out in Section 706 (which calls specifically for forbearance to accelerate deployment of advanced communications -- see 706(b)), the case for forbearance now as to that future investment is overwhelming.

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